WRITERS GUILD OF AMERICA WEST

August 20, 2018

The Honorable Joseph Simons
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chairman Simons,

Thank you for inviting public comment on evaluating the competitive effects of corporate acquisitions and mergers. I am submitting these comments on behalf of the Writers Guild of America West (WGAW), a labor organization representing more than 10,000 professional writers of motion pictures, television, radio, and Internet programming, including news and documentaries. Our members and the members of our affiliate, Writers Guild of America East (jointly, "WGA") create nearly all of the scripted entertainment viewed in theaters and on television today as well as most of the original scripted series now offered by online video distributors ("OVDs") such as Netflix, Hulu, Amazon, Crackle, and more.

The entertainment industry has experienced significant consolidation in recent years. The three largest employers—Disney-Fox, AT&T-Time Warner, and CBS-Viacom[1]—control almost 60% of the market for professional audiovisual writing services.[2] This level of consolidation creates significant buyer power in a labor market with high levels of search and matching frictions. The market for above-the-line[3] talent in the entertainment industry is characterized by limited and irregularly timed demand per job title, highly specialized skills, and a matching process strongly influenced by relationships and personal idiosyncrasies, contributing to employers' leverage. The three largest film distributors—Disney-Fox, AT&T-Time Warner, and Comcast-NBCU—account for more than two-thirds of annual box office receipts, with the other major studios, Sony and Viacom, accounting for most of the remainder.[4] Disney-Fox alone controls 30% of all basic cable affiliate fees in the US.[5]

Conventional economic and legal analysis of the competitive effects of corporate acquisitions and mergers has allowed this accumulation of market power and deterioration of competition in the entertainment industry and economy-wide. As Professor John Kwoka observed, "[M]erger enforcement has over time both diminished overall and tilted toward especially problematic mergers…the diminished attention to mergers involving somewhat lower market shares and concentration appears to have resulted in approval of significantly more mergers that prove to

[1] Due to joint supermajority ownership by National Amusement, CBS and Viacom are treated as a single entity for antitrust purposes according to Viacom's own annual reports. In addition, National Amusements is attempting to formally merger CBS and Viacom together.
[2] WGAW analysis using internal data.
[3] Above-the-line talent is the entertainment industry terminology for the key creative talent on a production, i.e. the writers, actors, and directors.
[4] Calculation using Box Office Mojo data
[5] Calculation using SNL Kagan data.

be anticompetitive."[6] In particular, the current model for antitrust enforcement fails to give sufficient consideration to labor market monopsony and vertical integration.

The Department of Justice and Federal Trade Commission's *Horizontal Merger Guidelines* state, "To evaluate whether a merger is likely to enhance market power on the buying side of the market, the Agencies employ essentially the same framework described above for evaluating whether a merger is likely to enhance market power on the selling side of the market."[7] Despite this, little attention has been paid to the effects of mergers on labor markets, and not a single merger has been blocked by the courts on the basis of labor market harm.[8] The extent and impact of antitrust underenforcement in this area is becoming clear from a stream of academic research suggesting extreme labor market concentration in much of the country. Using a dataset on the near universe of online job openings, Azar, Marinescu, Steinbaum, and Taska (2018) found an average labor market HHI of 3,963; 54% of labor markets are extremely concentrated.[9] A paper by Azar, Marinescu, and Steinbaum (2017) drawing upon CareerBuilder.com data found an average labor market HHI of 3,157.[10] The authors also found that extreme labor market concentration harms workers by suppressing wages. Moving from labor markets in the 25th percentile of concentration to labor markets in the 75th percentile is associated with a 17% decline in posted wages.[11]

Conventional economic and legal antitrust analysis tends to overstate the benefits and understate the harms of vertical integration, leading to relatively infrequent enforcement and a reliance on behavioral remedies. The DOJ's recent effort to block the AT&T-Time Warner merger stands out for the size of the transaction and the DOJ's insistence on structural remedies. However, between 1994 and 2016, the DOJ and FTC challenged only 52 vertical mergers, compared to 30-50 horizontal enforcement actions annually.[12] Recent research questions the realization of consumer benefits from the elimination of double marginalization ("EDM"), identifies the incentives to foreclose and resulting damage, and takes seriously the harms of access to competitively sensitive business information and enhanced bargaining leverage.[13] In a study of the integration of regional sports networks with multichannel video programming distributors, Crawford, Lee, Whinston, and Yurukoglu (2017) found that vertical integration harms rival distributors, and leads to consumer and total welfare losses in the absence of effective enforcement of program access rules.[14] In the vertical merger between Comcast and NBCU, the DOJ itself acknowledged minimal gains from EDM: "In certain industries, however, including the one at issue here, vertical mergers are far less likely to reduce or eliminate double marginalization...much, if not all, of any potential double marginalization is reduced, if not completely eliminated through the course of contract

[6] John Kwoka. 2015. *Mergers, Merger Control, and Remedies: A Retrospective Analysis of US Policy.* (Cambridge: The MIT Press), at 158.
[7] US Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* at 32 (Aug. 29, 2010).
[8] Hovencamp and Marinescu at 1.
[9] Jose Azar, Ioana Marinescu, Marshall Steinbaum, and Bledi Taska. 2018. "Concentration in US Labor Markets: Evidence from Online Vacancy Data." (Unpublished ms.). Available at: http://www.nber.org/papers/w24395.
[10] Jose Azar, Ioana Marinescu, and Marshall Steinbaum. 2017. "Labor Market Concentration." (Unpublished ms.). Available at: http://www.nber.org/papers/w24147.
[11] *Ibid.* at 2.
[12] Steven C. Salop and Daniel P. Culley. 2017. "Vertical Merger Enforcement Actions: 1994-2016." (Unpublished ms.). Available at: https://scholarship.law.georgetown.edu/facpub/1529/; Steven C. Salop. 2018. "Invigorating Vertical Merger Enforcement," *The Yale Law Journal.* 127:1962-1994 ("Salop 2018").
[13]Salop 2018.
[14] Gregory S. Crawford, Robin S. Lee, Michael D. Whinston, and Ali Yurukoglu. 2017. "The Welfare Effects of Vertical Integration in Multichannel Television Markets." *NBER Working Paper Series,* Working Paper 21832. Available at: http://www.nber.org/papers/w21832.

negotiations."[15] But the merger did incentivize Comcast to use its control as a distributor to favor its own networks and harm rival programmers, as evidenced in its dispute with Bloomberg TV.[16] Professor Steven Salop's call for stronger vertical enforcement rings especially true in the entertainment industry: "[V]igorous vertical merger enforcement is a necessity…particularly…in markets where economies of scale and network effects lead to barriers to entry and durable market power."[17]

These deficiencies in the existing antitrust enforcement framework have contributed to the current levels of concentration in the entertainment industry, where writers have long recognized the harms of consolidated media and creative labor markets. Writers experience these harms in downward pressure on their compensation, shrinking television writing staffs, the elimination of development jobs, and the near impossibility of walking away from abusive terms and working conditions. Media consolidation makes it even harder for diverse and independent voices to reach the public. As media conglomerates increasingly seek to own content and monetize it across ancillary markets worldwide, independent companies get squeezed out by the affiliated studios of television networks, OVDs, and major film distributors. Furthermore, media consolidation impedes innovation by subjecting creative decision-making to increased employer control and encouraging theatrical development budgets to be slashed in favor of movie franchises and remakes.

The entrance of Netflix and Amazon, two deep-pocketed and highly-visible companies, into the production of original programming has created a misperception that the market for creative labor has become robustly competitive. Netflix and Amazon are currently only minor producers of original content, each accounting for just 2% of WGAW-covered TV/digital earnings in 2016. As exhibitors of original programming, Netflix and Amazon are larger because they release series produced by third parties, but Amazon exhibited just 4% of all original scripted TV/digital episodes last season, while Netflix exhibited 12%. Instead, much of Netflix and Amazon's substantial programming budgets go to licensing syndicated content produced by traditional media companies who exercise buyer power in the market for creative labor. While Netflix may become a larger producer and exhibitor in the future, it will likely concentrate production in-house rather than nurturing an ecosystem of competing content suppliers. Beyond new streaming services from already-powerful players like Apple and Disney, additional competition is increasingly unlikely,[18] suggesting that attrition and consolidation in streaming services may diminish competition in the next few years.

Addressing the harms of labor market consolidation and vertical integration requires the discipline of retrospective review as well as new legal tools. Retrospective review is helpful in revising economic and legal analysis in light of observed behavior and unwinding mergers and acquisitions that prove anticompetitive. In addition, we encourage the Federal Trade Commission to support legislation that creates a rebuttable presumption of harm for megamergers and reduces the burden on plaintiffs suing to block a merger. These tools will enable the FTC to prevail in its attempts to restore free and fair market competition.

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[15] Competitive Impact Statement, *United States et al. v. Comcast Corp, et al. (2011).* Available at: http://www.justice.gov/atr/case-document/competitive-impact-statement-72.
[16] Jasmine Melvin, *FCC sides with Bloomberg over Comcast dispute*, Reuters (May 2, 2012), https://www.reuters.com/article/fcc-comcast-bloomberg/u-s-fcc-sides-with-bloomberg-over-comcast-dispute-idUSL1E8G2N8C20120502.
[17] Salop 2018 at 1962.
[18] Moffett Nathanson Research, *What Should Amazon Do with Prime Video*, at 1 (June 26, 2018).

Thank you for this opportunity to participate in these hearings.

Sincerely,

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